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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. CARL W. JASPER, Defendant.	Case No. CV 07-6122 JW **SECURITIES AND EXCHANGE COMMISSION'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [REDACTED]** Date: November 9, 2009 Time: 9:00 a.m. Location: Courtroom 8, Fourth Floor Hon. James Ware

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

Please take notice that on November 9, 2009, at 9:00 a.m. or as soon thereafter as the matter may be heard, in the courtroom of the Honorable James Ware, Courtroom 8, 4th Floor, United States District Court, 280 South 1st Street, San Jose, CA 95113, Plaintiff Securities and Exchange Commission will and hereby does move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment on all claims against Defendant Carl W. Jasper. In the alternative, the Commission will and hereby does move for partial adjudication of issues under Rule 56(d).

November 9, 2009, is the date ordered by the Court as the last day for hearing on motions for summary judgment. *See* Docket No. 60. Fact discovery in this matter closed on October 1.

The Commission's motion is made on the grounds that there is no material issue of fact to be decided and the Commission is entitled to judgment as a matter of law against Jasper based on the uncontroverted evidence in the record and the supporting papers.

The Commission's motion is based upon this Notice of Motion and Motion and the supporting Memorandum of Points and Authorities; the supporting Declaration of Erin E. Schneider; the pleadings on file; and such other evidence and oral argument as may be presented to the Court.

DATED: October 5, 2009

Respectfully submitted,

/s Robert S. Leach
Robert S. Leach

Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Defendant Carl W. Jasper was the Chief Financial Officer and Principal Accounting Officer of Maxim Integrated Products, Inc., a Silicon Valley semiconductor company that was particularly dependent on stock options to attract and retain employees and fuel its dramatic growth. From at least 2000 through 2005, in public filing after public filing signed and certified by Jasper, Maxim represented that its practice was to grant "at-the-money" options – options with an exercise price equal to the stock's trading price on the grant date – to motivate its employees to grow the stock price for investors, not the more lucrative "in-the-money" options, which give employees a leg up on ordinary investors and dilute the incentive Maxim said its options provided. Maxim disclosed no expenses relating to its stock option program in its annual and quarterly income statements and insisted it was following well-settled accounting principles that would require it to record an expense if it granted in-the-money options.

The undisputed evidence, however, demonstrates that Maxim was engaged in a years-long scheme to backdate stock options issued to Maxim employees and directors so that they would receive more valuable options. Maxim consistently used hindsight to find dates corresponding to low, historical stock prices to use as the grant date for stock options, and created paperwork making it look like Maxim had actually decided to award options on that date. Jasper knew of and participated in this backdating practice, and Jasper's stock administrator acknowledged Jasper's involvement. Jasper, moreover, was a Certified Public Accountant with decades of experience and knew the accounting rules required Maxim to record an expense for backdated, in-the-money options.

The evidentiary record submitted by the Commission, described in detail below, establishes that there is no genuine issue of material fact and that Jasper committed the securities fraud and other violations alleged by the Commission. Summary judgment is therefore appropriate. Indeed, it is particularly appropriate in this case because Jasper has chosen to respond to the overwhelming evidence of liability with silence. Rather than answer the Commission's discovery requests, Jasper repeatedly has asserted his Fifth Amendment right against compelled self-incrimination. While he is free to do so, the Court in this civil case "is equally free to draw adverse inferences from [his] failure

of proof," *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998), and to preclude him from testifying at trial, *see Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 910 (9th Cir. 2008).

The Court should grant summary judgment in favor of the Commission. If summary judgment is not rendered on the whole action, the Court should, to the extent practicable, determine what material facts are not genuinely at issue.

II. ISSUES TO BE DECIDED

1. Whether the Court should grant summary judgment when undisputed facts show that Jasper knew of and participated in Maxim's option backdating practice, knew the relevant accounting rules required Maxim to record an expense for backdated options, and reviewed and approved numerous SEC filings that omitted hundreds of millions of dollars in option-related expenses?

2. Whether the Court should preclude Jasper from testifying and draw adverse inferences from his repeated refusals to testify or otherwise respond substantively to discovery.

III. UNDISPUTED MATERIAL FACTS

A. Maxim Used Options to Recruit and Retain Employees

Maxim is a publicly traded company based in Sunnyvale that designs, manufactures, and sells high-performance semiconductors. First Amended Compl. ¶ 10 (Docket No. 7); Answer ¶ 10 (Docket No. 36). During the relevant period, Maxim liberally used stock options as compensation to recruit and retain employees in the competitive Silicon Valley marketplace.[1] Bergman Tr. at 16:23-18:5.[2] Indeed, stock options were the most important part of Maxim's compensation structure. Ex. 1 at MXIM-SEC 994 & Ex. 2 at MXIM-SEC 1034; Hagopian Tr. at 60:5-25. Its compensation program was heavily tilted toward performance-based compensation. Ex. 1 at MXIM-SEC 994 &

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[1] A stock option gives the recipient the right to buy company stock at a set price, called the "exercise" or "strike" price, on a future date after the option vests. An option is "at-the-money" when granted if the trading price of the company's stock on the grant date equals the exercise price. It is "in-the-money" when granted if the trading price of the company's stock on the grant date exceeds the exercise price. Answer ¶ 11; *see In re Zoran Corp. Derivative Litig.*, 511 F. Supp. 2d 986, 996-997 (N.D. Cal. 2007); *In re CNET Networks, Inc.*, 483 F. Supp. 2d 947, 949-950 (N.D. Cal. 2007).

[2] All exhibits and transcripts cited in this memorandum are attached to the Declaration of Erin E. Schneider in Support of Plaintiff's Motion for Summary Judgment. The numbered exhibits bear the exhibit number assigned at depositions in this case. Exhibits not previously marked in deposition are exhibits A through CC and the deposition transcripts are exhibits DD through OO.

Ex. 2 at MXIM-SEC 1033; Hagopian Tr. at 43:13-45:18, 63:25-64:16; Bergman Tr. at 20:20-22:5, 31:18-32:9. Because Maxim paid lower salaries than its competitors, options were "quite necessary" to attract talent. Ex. 1 at MXIM-SEC 994 & Ex. 2 at MXIM-SEC 1034; Hagopian Tr. at 45:19-46:7, 51:24-53:21, 66:2-19; Bergman Tr. at 25:19-26:21, 33:5-23. Maxim attributed its earnings growth and positive returns in part to its option practices and repeatedly emphasized such facts in communications with shareholders. Exs. 1 & 2; Bergman Tr. at 18:6-20; Gilbert Tr. at 163:12-165:13 & Ex. 45 at BKH-SEC 165 ("Maxim believes that its option program has been a major contributor to its extraordinary success over the years because of the plan's contribution to recruiting and retaining employees and to aligning the interests of the employees with those of our stockholders by motivating them to work long and hard to increase the value of Maxim."); Ex. 91 at 13 ("The Company's success depends to a significant extent upon the continued use of stock options as a compensation tool."); Ex. A at Slides 10-12 (noting options are key to recruitment goals and help contain salary expense).

B. Jasper Was Responsible for Maxim's Accounting for Stock Options

Jasper was Maxim's Principal Accounting Officer, Chief Financial Officer, and Vice President from April 1999 through January 2007. First Amended Compl. ¶ 9; Answer ¶ 9.[3] [redacted] Hagopian Tr. at 133:18-21. As CFO, Jasper oversaw the company's stock administration department. *Id.* at 133:18-134:10, 244:6-246:2.

Maxim vested authority to grant employee and director stock options in an Interim Option Committee, consisting of the CEO. Bergman Tr. at 41:9-42:22; Ex. 28; Raymond Tr. at 42:14-44:1; Answer ¶ 19. As CFO and head of stock administration, Jasper was responsible for ensuring that Maxim accounted for these option grants correctly. Bergman Tr. at 60:18-61:11; *see also* Gilbert Tr. at 70:21-71:22 (describing how Jasper's stock administration group was responsible for [redacted]

[3] Jasper obtained a California Certified Public Accountant license in 1984. Before joining Maxim, he was an auditor at the Big Four accounting firm Ernst & Young from 1983 to 1995 and Corporate Controller at Read Rite Corp. First Amended Compl. ¶ 9; Answer ¶ 9; Ex. 89 at 23.

[redacted] Hagopian Tr. at 244:21-246:2. Jasper transmitted to the CEO for his signature paperwork purporting to document when a grant had been made. Raymond Tr. at 63:25-64:17, 67:8-68:14, 69:1-18. He informed others within stock administration of the CEO's approval of various grant dates. Raymond Tr. at 60:7-19. He recommended to the CEO, and approved his direct reports' recommendations of, stock options for employees reporting to him. Exs. 130, 161, & 162; Flett Tr. at 77:5-80:2; 85:23-91:25; Ex. 136; Caron Tr. at 25:16-27:18, 150:11-152:25. Jasper's office also communicated to certain employees the dates by which stock option recommendations needed to be submitted to the CEO. Caron Tr. at 59:20-60:10.

[redacted] Bergman Tr. at 55:8-56:2. Jasper implemented and articulated to others Maxim's internal controls over option granting; indeed, he advised Maxim's Board that he personally reviewed all new option grants. Ex. 6; Hagopian Tr. at 122:22-123:11.[4] Jasper also assured the Board that Maxim's option granting process was "well documented by . . . his group" and that he "closely monitor[ed] the closing price of Maxim stock each day" in an attempt to time the market – i.e., contemporaneously grant options on days when the stock was at a relative low price. Ex. 8; Bergman Tr. at 65:14-67:23, 70:1-5, 73:11-74:17, 78:4-21. Jasper even authored a memo on how to structure Maxim's option program "to get the favorable accounting treatment we want (i.e. no compensation expense related to bonus options)." Ex. 49; Gilbert Tr. at 173:11-174:13.

C. Jasper Actively Participated in Maxim's Option Backdating Scheme

From at least 2000 through 2005, Maxim backdated stock option grants made to employees and directors, using hindsight to select grant dates corresponding to historical low-points in its stock price and then creating grant paperwork to make it look like Maxim's CEO had made the granting decision on that date. Multiple witnesses from Maxim's stock administration department testified

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[4] Jasper also certified in multiple SEC filings that he was responsible for Maxim's internal controls over financial reporting. *See* Exs. 15, 91, & 92 at Ex. 31.2.

that Maxim routinely used historical stock price information to pick favorable – i.e., low – stock prices as recommended exercise prices for option grants to employees. Wong Tr. at 69:3-72:22, 80:6-15, 99:3-22 (describing how stock administration "recommended the prices up . . . the chain"); *id.* at 146:5-147:9, 148:13-149:14 & Ex. 125 (describing how stock administration would generate reports from which they would recommend low stock prices for options to employees); Raymond Tr. at 116:4-16, 117:3-19, 121:12-15, 122:21-123:5, 143:18-144:15, 144:23-146:8, & Exs. 125 & 126.

For example, Sandy Wong, an assistant in stock administration from 1999 to 2007, testified: "Maxim's general practice [was] to grant a favorable price, or in [other] words, the lowest possible price to employees during a given quarter. So that is why we [were] . . . waiting towards more the end of the quarter to see what price that really [was] the lowest." Wong Tr. at 148:13-149:14; 12:16-25, 27:16-28:19. This practice held true in every single quarter in which Wong served in stock administration. She could not recall a single exception, nor could she recall an instance where stock administration received a memo from Maxim's CEO approving an option grant before running a report of Maxim's historical stock prices. *Id.* at 149:18-150:2, 159:1-16, 160:17-23. Wong also testified that the process – using hindsight to select favorable exercise prices – was the same for grants to both new and existing employees. *Id.* at 170:13-171:21, 173:9-174:7, 175:3-20, 177:8-16, 179:7-22, 184:22-185:15, & Ex. 128.[5]

Having used hindsight to select the favorable exercise price, stock administration also prepared backdated memos from Carl Jasper for Maxim's CEO's signature, indicating his approval of the date, recommended exercise price, and other details of the option grant. *Id.* at 76:22-77:20, 79:24-80:21, 81:5-82:16, 84:5-85:4, 186:4-19; *see* Ex. 129 (memo dated March 11, 2003 stating "[g]o ahead and grant options today to all new hires that have started since February 7, 2003 at today's closing price"). *Cf.* Ex. 128 (reflecting price selection on April 4, 2003); Raymond Tr. at 143:18-144:15 (describing how after selecting low prices for grants stock administration would

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[5] For ten consecutive quarters, from the second quarter of fiscal year 2002 to the fourth quarter of fiscal year 2004, Maxim granted backdated options to current employees with an exercise price equal to the lowest price of the quarter. *Compare* Ex. B *with* Ex. C.

provide Jasper with memos to sign approving the grant). Maxim's CEO returned signed approval memos to Jasper, who returned them to stock administration. Raymond Tr. at 69:1-21 & Ex. 31.

Wong's boss, stock administrator Sheila Raymond, described a similar process: "under general practices, the lowest price was going to be the grant date, under the general practice." *Id.* Exs. 125 & 126 & 116:4-16; *id.* at 117:3-19 (noting that by 2004 "it was pretty much the case that whatever was the lowest price in the quarter, that was going to be the grant date"); *id.* at 121:12-15, 122:21-123:5, 143:18-144:2, 144:23-146:8 (stating that the practice may have existed in 2002 and 2003). She testified that in instances where stock administration used a low stock price for the exercise price of an option, she would have told Jasper or her immediate supervisor. *Id.* at 123:24-124:16. Raymond added later: "Carl knew what was happening." *Id.* at 224:12-226:7 & Ex. 174.[6]

Moreover, undisputed documentary evidence demonstrates Jasper not only knew about Maxim's backdating practice, but actively suggested historical low prices to Maxim's CEO:

- On August 22, 2003 (when Maxim's stock traded at $43.78), Maxim's CEO asked Jasper in writing what was the lowest price Maxim could use for an option grant in the first quarter of fiscal 2004. Ex. 56; Schneider Decl. ¶¶ 2-3, 24; Ex. B. Jasper replied in writing: "The best price is the first day of the quarter – June 30, 2003. The price was $34.10 on that date. . . . I have attached a listing of Maxim's closing stock prices for the quarter for your reference." Ex. 115; Schneider Decl. ¶¶ 2-3, 69. Maxim's CEO ultimately chose to use June 30, 2003 as the purported grant date. Ex. Z.
- On December 28, 2001 (when Maxim's stock traded at $54.61), Jasper proposed the CEO use low historical prices as exercise prices for option grants to Maxim employees, writing "[g]iven the run up in our stock price this quarter, I would like to propose the following to set the option price for Q202 activity." Ex. 61; Schneider Decl. ¶¶ 2-3, 28. Maxim ultimately used the dates and prices recommend by Jasper to grant options to certain employees. Ex. AA.

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[6] Other documents confirm that the date reflected in grant approvals was not the date Maxim's CEO decided to make the grant. *See* Ex. 31 (memo to Jasper from Maxim's CEO dated February 28, 2002 stating "I have granted options today for all existing employee reviews for this quarter – the stock closed at $45.76"); Ex. 117 (March 18, 2002 e-mail reflecting reviews for the quarter had yet to be submitted); Wong Tr. at 86:16-87:13, 91:6-22, 93:3-94:12, 95:20-96:1, 98:6-99:17.

- On February 28, 2003 (when Maxim's stock traded at $34.54), Jasper proposed in writing that Maxim's CEO grant a backdated option to a Maxim executive. He urged the CEO to "grant him an option now at the Oct price so that he gets a favorable price. I believe this will go a long way in ensuring he stays at Maxim." Ex. 81; Wong Tr. at 197:2-203:4, 204:21-205:1; Malae Tr. at 33:12-34:6; Schneider Decl. ¶¶ 2-3, 40. Maxim's CEO approved the backdated grant with an exercise price of $21.35. Ex. 149; Caron Tr. at 164:10-166:19.

- On April 22 and 23, 2002, Jasper created and printed a memorandum to Maxim's CEO attaching grant approval memos dated February 28, 2002, and March 25, 2002. Ex. 60; Schneider Decl. ¶¶ 2-3, 27; *see also* Ex. 59 (signed March 25, 2002 approval memo to Jasper).[7]

- On December 10, 2001, Jasper proposed that Maxim's CEO grant backdated options to directors "before the price gets away from us" with prices in October 2001 and provided an approval memo "to keep our audit trail straight." Ex. 36; Schneider Decl. ¶¶ 2-3, 18. Maxim's CEO ultimately signed minutes backdated to October 1, 2001, stating he had granted options to the directors on that date, but no expense was recognized. Ex. 39; Gilbert Tr. at 127:18-128:25.

- On January 4, 2000, Jasper gave Maxim's CEO a range of low prices from October 1999 and suggested that the CEO grant options to directors with an October 21, 1999 date. Exs. 34 & 52; Schneider Decl. ¶¶ 2-3, 17; Gilbert Tr. at 181:1-182:24.[8] So that Maxim could have – in Jasper's words – "a clean audit trail," Jasper also requested that Maxim's CEO sign a memorandum backdated to October 21, 1999 stating that the CEO had granted the options on that date. Ex. 34.

- On August 2, 2000, Jasper offered assistance to Maxim's CEO in changing the terms and backdating a grant for a newly hired employee so that the employee could get a lower exercise price. Jasper acknowledged it was improper to do so. Exs. 67 & 68; Schneider Decl. ¶¶ 2-3, 30-31.

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[7] Additional evidence demonstrates Jasper created, printed, or authored grant approval memos months after the purported grant date. For example, in February 2000 Jasper created and printed a memo dated October 21, 1999, stating that the CEO had approved options to directors as of October 21, 1999. *See* Ex. 64; Schneider Decl. ¶¶ 2-3, 29; Ex. BB; *see also* Exs. 79 & 121 (undated Jasper memo about options with October 2002 price); Malae Tr. at 29:19-32:14, 36:11-39:3.

[8] On January 4, 2000, Maxim stock closed at $47.25. Ex. B. Maxim effected a 2-for-1 stock split on December 22, 1999. Ex. 89 at 67. Adjusting for the split, Jasper was proposing options be granted with an exercise price of $34.63 – a nearly 27% discount to the then-current trading price.

- On or around March 2, 2000, Jasper recommended to Maxim's CEO that Maxim use grant dates in December 1999 for options for certain employees, despite the fact that the grant was not finalized in December. Jasper suggested that Maxim "take the risk that the auditors will not challenge" Maxim's decision. Ex. 69; Schneider Decl. ¶¶ 2-3, 32. Maxim ultimately used the December dates to grant options to certain employees. Ex. CC.

- Finally, in late November 2002, Jasper recommended in writing that Maxim's CEO grant director options using October 10, 2002 as the grant date. Ex. 78; *see also* Ex. 77 (Jasper advising directors on December 3, 2002 about grants); Schneider Decl. ¶¶ 2-3, 38.

Through its backdating practice, Maxim was secretly granting "in-the-money" options, despite numerous public statements that it granted only "at-the-money" options. Moreover, under Accounting Principles Board Opinion No. 25, "*Accounting for Stock Issued to Employees*" ("APB 25") and generally accepted accounting principles ("GAAP") in effect from 1997 through 2005, Maxim was required to record an expense in its income statement for in-the-money options. Ex. E ¶ 10(b). According to APB 25, when a company granted an option with an exercise price below the stock's market price on the grant date, the difference was to be recorded as an expense recognized over the vesting period of the option. *Id.* APB 25 allowed companies to grant employee options with no expense, but only when the key terms of an option grant were known and the exercise price equaled the stock's market price on the grant date (i.e., the option was at-the money). *Id.*; *In re CNET Networks*, 483 F. Supp. 2d at 955.[9]

D. Jasper Understood the Accounting Rules Required Maxim to Record an Expense for Any Backdated Stock Options

Jasper, Maxim's CFO and a Certified Public Accountant, understood the accounting implications of awarding backdated, in-the-money options. Ex. 3 & Hagopian Tr. at 113:3-114:20,

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[9] *See also United States v. Reyes*, 2007 WL 1574540, at *3 (N.D. Cal. May 30, 2007) ("It is impossible to square the deliberate retroactive pricing of stock options with the plain text of APB 25, which instructs companies that the proper measurement date is the 'first' date on which the grantor knows 'the number of shares' and 'the option or purchase prices.' . . . If APB 25 precludes *anything*, it prohibits . . . deliberately choosing a strike price based on a favorable historical date and then . . . pretending that the option was granted earlier than it actually was.").

246:17-247:22; Bergman Tr. at 58:25-59:10; Gilbert Tr. at 113:8-114:17, 136:4-22, & Ex. 41 at MXIM-SEC 88267 & 95 (noting Jasper was a "major contributor[]" to a "think piece" on option accounting that described APB 25's requirement that in-the-money options be expensed); Ex. 49 (Jasper writing "[a]s long as the options are granted at fair market value on the date the number of shares . . . and other pertinent information is known, then we do not need to record any compensation expense related to the options."). For example, he told Maxim's CEO in writing that Maxim should record an expense when giving a retroactively priced option. Exs. 67 & 68; *see also* Ex. 86 (memo to Jasper advising "unfortunately we can not grant [options] with hindsight"). Jasper advised others on "technical accounting" issues relating to expensing of employee stock options, Ex. 4; Hagopian Tr. at 117:6-118:25, and he told Maxim's Board that he understood Maxim would have to record an expense if it backdated options to get a lower price. Hagopian Tr. at 107:8-19, 128:14-129:19, 139:12-140:3; Ex. 7; *see also* Ex. 18 & Hagopian Tr. at 285:3-286:11. Jasper also authored or received numerous documents showing he understood the rules relating to option expensing. *See, e.g.*, Exs. 70, 71, 75, F (describing to a Maxim employee how compensation charges are determined), & G (assuring CEO the "Company is aware of the current accounting rules and pending rules especially as it relates to . . . the accounting consequences of option grants to non-employees. We will continue to monitor future changes and ensure our stock plans and practices are meeting the objectives . . . of the accounting profession"); Schneider Decl. ¶¶ 2-3, 92; Malae Tr. at 69:24-70:12.[10]

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[10] Jasper and Maxim monitored and fiercely resisted efforts to require technology companies to expense all options – even at-the-money options – in the income statement. Ex. 72; Schneider Decl. ¶¶ 2-3, 35; Ex. 84; Bergman Tr. at 129:14-130:24 ([redacted]); *see also* Gilbert Tr. at 23:9-24:14, 25:9-21, 27:25-30:3. They told investors that if Maxim were required to expense at-the-money options, it could have a material adverse impact on Maxim's ability to attract, retain, and motivate employees, as well as its financial condition and results of operations. Ex. 91 at 13-14; *id.* at 8 & 13 (identifying Maxim's continued ability to grant options without expense as a factor that investors should give "careful consideration"). Jasper even told Maxim's auditor, Ernst & Young, that it was interviewing other auditing firms because Ernst & Young publicly supported changes in the accounting rules that would require expensing for at-the-money options. Ex. 71.

E. Jasper Approved Maxim's False and Misleading Public Filings

Despite actively participating in Maxim's backdating scheme, and knowing that Maxim should have recorded an expense for its backdated options, Jasper reviewed, approved, and signed Maxim's annual reports on Form 10-K for the fiscal years ended June 24, 2000, through June 25, 2005. Ex. 89 at 26; Ex. 114 at 27; Ex. 90 at 74; Ex. 15 at 56; Ex. 91 at 52; Ex. 92 at 63; Portnoy Tr. 154:21-155:17; Caron Tr. at 174:13-177:20. Jasper also signed certifications stating that he had reviewed Maxim's 2002, 2003, 2004, and 2005 annual reports, that they did not contain any untrue statements of material fact or omit to state a material fact, and that they fairly presented Maxim's financial condition and results. Ex. 90 at 77 & Exs. 15, 91, & 92 at Exs. 31.2 & 32.2.

The annual reports omitted hundreds of millions of dollars in expenses for backdated options, and thus overstated Maxim's operating income by hundreds of millions of dollars. Ex. 89 at 60-64; Ex. 114 at 469-474; Ex. 90 at 40-47; Ex. 15 at 31-34; Ex. 91 at 31-34; Ex. 92 at 37-40; Portnoy Tr. at 145:22-147:4. When it restated its financial statements in September 2008, Maxim recorded more than $600 million in negative pre-tax adjustments for stock-based compensation for fiscal years 2000 through 2005:

	FY00	FY01	FY02	FY03	FY04	FY05
Pre-tax Adjustments for Stock-Based Compensation	$72,302,000	$84,316,000	$91,145,000	$127,366,000	$153,530,000	$86,628,000
Originally Reported Operating Income	$508,560,000	$445,166,000	$345,352,000	$447,036,000	$606,035,000	$781,732,000
Percentage Overstatement of Operating Income	14.2%	18.9%	26.4%	28.5%	25.3%	11.1%

Ex. H at 95-101; Ex. I at 8. Considering only director, employee and new hire option grants in fiscal years 2003, 2004, and 2005, Albert A. Vondra, a partner and Certified Public Accountant with PricewaterhouseCoopers LLP who was retained as an expert in this matter, found overstatements of operating income ranging from $135 million to $357 million:

	FY03	FY04	FY05
Minimum Pre-Tax Adjustment for Stock-Based Compensation for Selected Stock Option Grants	$35,698,000	$49,890,000	$49,749,000

Maximum Pre-Tax Adjustment for Stock-Based Compensation for Selected Stock Option Grants	$99,652,000	$130,995,000	$126,269,000
Originally Reported Operating Income	$447,036,000	$606,035,000	$781,732,000
Minimum/Maximum as Percent of Originally Reported Operating Income	8.0% – 22.3%	8.2% – 21.6%	6.4% – 16.2%

Ex. I at 6-10.

In addition to omitting vast amounts of expenses, the annual reports signed and certified by Jasper also falsely stated that:

- Maxim accounted for its employee stock option plans in accordance with APB 25. Ex. 89 at 66; Ex. 114 at 477; Ex. 90 at 51; Ex. 15 at 37; Ex. 91 at 38; Ex. 92 at 44.
- Maxim granted, or generally granted, options at prices not less than the fair market value of its common stock on the grant date. Ex. 89 at 73; Ex. 114 at 488; Ex. 90 at 60-61; Ex. 15 at 46; Ex. 91 at 45; Ex. 92 at 53.
- Maxim was not required to record compensation expenses in connection with stock option grants to employees. Ex. 91 at 13.

Jasper also reviewed, commented on, signed, and certified Maxim's quarterly reports on Form 10-Q during its fiscal years 2003 through 2005, which like the annual reports omitted millions of dollars in expenses for backdated options and thus overstated Maxim's operating income. Ex. 93 at 3-5, 22, 24; Ex. 94 at 3-5, 23, 25, & Ex. 99.2; Ex. 95 at 3-5, 26, 28, & Ex. 99.2; Ex. 96 at 3-5, 22, 24, & 26; Ex. 97 at 3-5, 23, & Exs. 31.2 & 32.2; Ex. 98 at 3-5, 22, 24, & 26; Ex. 99 at 3-5, 21, & Exs. 31.2 & 32.2; Ex. 100 at 3-5, 24, & Exs. 31.2 & 32.2; Ex. 101 at 3-5, 24, & Exs. 31.2 & 32.2; Caron Tr. at 189:24-191:12; Ex. I at 25 & 27 (detailing quarterly understatements of expenses). Beginning with the Form 10-Q for the third quarter of fiscal 2003, the quarterly reports falsely stated that Maxim accounted for its stock option plans in accordance with APB 25. *See* Exs. 95-101 at 6-7.

In addition, Jasper drafted or reviewed Maxim's 2004 and 2005 proxy statements filed with the Commission. Gilbert Tr. at 36:25-37:4; Exs. J at 55 & K at 68 (allowing investors to appoint Jasper as their proxy); Ex. A at Slide 22 (directing investors to obtain the proxy from Jasper). But, as Jasper understood, Maxim's proxy statements made materially false representations about Maxim's stock option grants. For example, Maxim's 2004 proxy statement requested shareholders approve

additional shares for its option plan, and stated falsely that the Company's plan was "managed for the best interests of the stockholders" in part because "[a]ll of Maxim's options are granted at fair market value." Bergman Tr. at 18:21-19:12, 26:22-27:22; Ex. 1 at MXIM-SEC 994; Ex. J at 6; *see also* Ex. A at Appendix Script re Slide 3. Maxim's October 7, 2005 proxy statement, which also requested shareholders approve more shares for the option plan, similarly misrepresented that the plan was "managed for the best interest of the stockholders" because "Maxim's stock options have always been granted with an exercise price equal to the fair market value of Maxim's stock." Bergman Tr. at 30:16-31:17, 33:24-34:19; Ex. 2 at MXIM-SEC1034; Ex. K at 5.[11]

Furthermore, Jasper reviewed and signed Maxim's current reports on Form 8-K during fiscal years 2003 though 2005 announcing Maxim's financial results. Exs. 102-110; Caron Tr. at 192:13-193:20. As Jasper understood, these current reports, like the quarterly and annual reports Maxim ultimately filed, were materially false and misleading because Maxim recorded no expense for its undisclosed in-the-money option grants. *Id.* Finally, Jasper signed Maxim's registration statements on Forms S-8, which incorporated Maxim's false and misleading financial statements. Exs. 111-113.

F. Jasper Misled Maxim's Auditor and Board

In addition to lying to Maxim's shareholders about Maxim's backdating practice, Jasper lied to Maxim's outside auditor, Ernst & Young. As part of its audits of Maxim's fiscal 2003 and 2004 financial statements, Ernst & Young required Jasper to sign management representation letters stating, among other things, that Maxim's fiscal 2003 and 2004 financial statements were fairly presented in conformity with GAAP, that no material transaction had been improperly recorded in the accounting records underlying the financial statements, and that he knew of no fraud affecting management with significant roles in Maxim's internal controls. Ex. 151 at MXIM-SEC30505, 06,

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[11] Jasper monitored how Maxim shareholders voted on proposals in proxy statements to increase the authorized number of options Maxim could award. *See, e.g.*, Exs. 24 & 73; Schneider Decl. ¶¶ 2-3, 15, 36; Malae Tr. at 78:15-83:14. One of Maxim's largest shareholders, Capital Research, maintained written policies stating it negatively viewed option plans and generally voted *against* plans allowing in-the-money options. Chapman Tr. at 27:2-12, 29:12-32:22, 37:16-38:16, 39:22-41:13; Ex. 235; Ex. J at 4. ISS, a leading corporate governance research firm that provides proxy advising services, recommended shareholders support proxy proposals that firms expense at-the-money options. Carter Tr. at 16:10-15, 66:1-70:5; Ex. 225.

& 10; Ex. 152 at EY8413, 415, & 418; Caron Tr. at 199:5-200:2; Portnoy Tr. at 149:2-153:11. These representations were false. Jasper never disclosed to Ernst & Young that it was using hindsight to price options; had Jasper done so, it would have affected Ernst & Young's opinion that Maxim's financial statements conformed with GAAP. Portnoy Tr. at 157:21-160:12.

Jasper also repeatedly lied to Maxim's Board about Maxim's stock option granting process. First, in 2004, Jasper separately told two Maxim Board members that Maxim did not backdate option grants and if it did, it would need to record an expense. Ex. 7 & 8; Hagopian Tr. at 128:14-129:19, 138:8-139:7, 143:5-144:13, 146:16-147:6; Bergman Tr. at 65:14-67:23, 70:1-5, 74:23-77:21. Second, in 2006, after news reports of possible options backdating at technology companies surfaced, Jasper again concealed the backdating scheme. Despite the fact that Jasper had direct knowledge of numerous backdated grants, he "assured [a Maxim board member] in no uncertain terms that Maxim has *never* backdated any option grants to either officers or rank and file employees." Exs. 9 & 10; Hagopian Tr. at 145:15-153:1, 155:6-156:18.

G. Maxim's $838 Million Restatement

On May 22, 2006, an equity analyst published a report entitled "Options Pricing – Hindsight is 20/20" noting that the timing of options pricing for certain semiconductor companies (including Maxim) had been very advantageous. Ex. L. That day, Maxim's stock price declined to $31.56 from the previous day's closing of $32.97, a decline of $1.41 or 4.28%. Ex. M ¶ 87. This decline was statistically significant. *Id.* ¶ 84. Maxim formed a special committee of its directors to investigate its stock-option practices. Ex. N. On September 8, 2006, Maxim reported that it would be unable to timely file its annual report on Form 10-K because of the ongoing investigation. *Id.* By the end of the trading day, Maxim's stock price declined to $28.56 from the previous day's close of $29.20, a statistically significant decline of $0.64 or 2.19%. Ex. M ¶ 87-88.

On January 17, 2008, Maxim confirmed that it needed to restate its financial statements to record additional stock-based compensation charges and, for the first time, disclosed its preliminary conclusions regarding the restatement. Exs. O & M ¶¶ 94-100. Maxim reported that it expected to restate financial statements from fiscal 1997 through fiscal 2005 and interim periods through March 25, 2006, and to record additional expenses ranging from $550 to $650 million on a pre-tax basis. *Id.*

Maxim also announced that its restatement would take much longer than expected. *Id.* That day, Maxim's stock price declined to $20.80 from $23.63, a decline of $2.83 or 11.98%. This decline too was statistically significant. *Id.*

Finally, on September 30, 2008, more than 28 months after forming a special committee to investigate its option granting practices, Maxim filed its restated financial restatements.[12] Almost ten years of financial results were restated or adjusted. Maxim recorded an additional $838.3 million charge to pre-tax income, including a pre-tax charge for stock-based compensation expense totaling $773.5 million. Exs. Q & H. The filing included management's report on internal control over financial reporting, which concluded, among other things, that two material weaknesses existed in Maxim's internal control over financial reporting as of June 24, 2006, due to the effect of not maintaining an effective control environment and, separately, not maintaining effective controls over stock option practices and the related accounting for stock option transactions. Ex. H at 69-75. Maxim's new outside auditor, Deloitte & Touche, audited management's assessment and opined that because of these material weaknesses, Maxim did not maintain effective control over financial reporting as of June 2006. *Id.*

H. Jasper's Refusal to Respond to Discovery

For over two years, Jasper has rebuffed the Commission's efforts to obtain information from him about his participation in the backdating scheme. During the Commission's investigation, Jasper declined to answer substantive questions based on his Fifth Amendment right against compelled self-incrimination. First Amended Compl. ¶ 9; Answer ¶ 9. During the course of this litigation, between May 2008 and August 2009, Jasper refused to provide substantive answers to three sets of written interrogatories and requests for admission propounded by the Commission. Exs. R-T & U-W.

Jasper also declined to answer anything but routine background questions at his deposition in September 2008, invoking the Fifth Amendment on all questions relating to his knowledge of the backdating, the accounting rules, and Maxim's SEC filings. *See generally* Jasper Tr. For example, Jasper refused to answer questions such as:

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[12] Maxim's stock was delisted from NASDAQ because of the delay in the restatement. Ex. P.

[redacted]

Jasper declined to [redacted]. *See, e.g.*, Jasper Tr. at 26:19-27:16 ([redacted]); *id.* at 37:14-39:6, 42:25-44:8, 49:4-53:8. 73:7-75:21 ([redacted]); *id.* at 58:20-61:17, 61:24-62:25 ([redacted]); Exs. U & W.

On the night of the October 1, 2009 discovery cut-off, Jasper again invoked the Fifth Amendment. Exs. X & Y.

IV. ARGUMENT

A. Summary Judgment Should Be Granted When There Is No Genuine Issue for Trial

Summary judgment should be rendered "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. Proc. 1). Once the moving party has identified portions of the record that show the absence of a genuine issue of material fact, the opposing party has the burden to controvert that showing. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The opposing party

cannot rely "merely on allegations or denials," but must, by affidavit or otherwise, "set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Fed. R. Civ. Proc. 56(e). If "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

Rule 56(d) also provides that, if summary judgment is not rendered on the whole action, the Court should, to the extent practicable, determine what material facts are not genuinely at issue. After examining the pleadings and evidence before it and interrogating the attorneys, the Court should "issue an order specifying what facts . . . are not genuinely at issue. The facts so specified must be treated as established in the action." Fed. R. Civ. Proc. 56(d)(1).

In this case, the evidentiary record submitted by the Commission establishes that there is no genuine issue of material fact and that Jasper committed the violations alleged against him. Thus, the Court should grant summary judgment. In the alternative, the Court should issue an order specifying what facts are not genuinely at issue.[13]

B. Jasper Committed the Securities Law Violations Alleged Against Him

1. Jasper Committed Securities Fraud

Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder prohibit material misstatements or omissions made with scienter in connection with the purchase or sale, or in the offer or sale, of any security. *See* 15 U.S.C. § 77q(a) (prohibiting fraud in the offer or sale of securities); 15 U.S.C. § 78j(b) & 17 C.F.R. § 240.10b-5 (prohibiting fraud in connection with the purchase or sale of securities); *Ponce v. SEC*, 345 F.3d 722, 729 (9th Cir. 2003).[14] These elements are satisfied here.

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[13] In its prayer, the Commission seeks injunctive relief, forfeiture of bonuses and stock sales under Sarbanes-Oxley Act Section 304 (15 U.S.C. § 7243), disgorgement with pre-judgment interest, civil penalties, and an officer-and-director bar. The Commission requests that these remedies be determined by the Court in subsequent proceedings. *See SEC v. M&A West Inc.*, 538 F.3d 1043 (9th Cir. 2008) (affirming summary judgment but remanding for proceedings on remedies).

[14] The Commission's third claim for relief alleges violations of Section 17(a)(2) and 17(a)(3) of the Securities Act, 15 U.S.C. § 77q(a)(2) and (a)(3). The Commission need not prove scienter for this claim. *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980).

Jasper repeatedly made false statements to investors. Maxim's annual, quarterly, and current reports falsely stated that Maxim recorded stock option expenses in accordance with APB 25 and that it granted only at-the-money options. In truth, Maxim flouted APB 25, routinely granted in-the-money options disguised through backdating as at-the-money options, and omitted hundreds of millions in expenses required by GAAP. As the CFO who reviewed, signed, and certified these filings, Jasper is primarily liable for them. *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061-62 (9th Cir. 2000) (§ 10(b) liability extends to those who sign false SEC filings).

Overwhelming evidence also demonstrates Jasper acted with scienter – i.e., that he knew or was reckless in not knowing his representations were false. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Recklessness satisfies the scienter element. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-59 (9th Cir. 1990) (en banc). Here, documentary evidence shows that Jasper not only knew about Maxim's backdating practice, but actively participated in it. On multiple occasions, over many years, Jasper suggested historical low prices to Maxim's CEO. *See, e.g.*, Ex. 115 (Jasper writing in late August "[t]he best price is the first day of the quarter – June 30, 2003"); Ex. 81 (urging CEO in February 2003 to grant an option dated October "so that [the employee] gets a favorable price"). Jasper's subordinates Shelia Raymond and Sandy Wong testified that the stock administration department Jasper ran was backdating for as long as they could remember, and in Raymond's words: "Carl knew what was happening." Raymond Tr. at 224:12-226:7 & Ex. 174. There is no doubt Jasper knew the accounting rules required Maxim to expense in-the-money options; numerous witnesses and documents attest to his knowledge. *See infra* III.D. Finally, when confronted about backdating, Jasper lied to the Board, insisting in "no uncertain terms" that Maxim had *never* backdated. Such false exculpatory statements are evidence of Jasper's consciousness of guilt and have independent probative value of scienter. *United States v. Newman*, 6 F.3d 623, 628-29 (9th Cir. 1993); *SEC v. Musella*, 748 F. Supp. 1028, 1040 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 138 (2d Cir. 1990).

Jasper, moreover, was no ordinary Maxim employee. He was the Principal Accounting Officer and Chief Financial Officer of a billion-dollar public company, with decades of experience as

a Certified Public Accountant. The Ninth Circuit recently emphasized the significant role a CFO like Jasper plays:

> [The defendant] was no ordinary [public company] employee. He served as the public company's CFO – the senior corporate executive charged with primary responsibility for [the company's] financial affairs. This was a sophisticated corporate enterprise with billions of dollars in sales worldwide . . . . The duties undertaken by [the CFO] broadly encompassed not only accurately and completely reporting the company's historical and current stock option granting practices, but also [the company's] strict compliance with reporting and record keeping requirements imposed through the Securities Exchange Act of 1934 and the Sarbanes-Oxley Act of 2002, among many other federal and state rules and regulations. As the head of finance, [the CFO] cannot now credibly claim ignorance of the general disclosure requirements imposed on a publicly traded company with respect to its outside auditors or the need to truthfully report corporate information to the SEC.

United States v. Ruehle, __ F.3d __ (9th Cir. Sept. 30, 2009) (citation omitted).

Jasper's misrepresentations and omissions were material. Information is material if there is a substantial likelihood that a reasonable shareholder would consider it important – i.e., that a reasonable investor would have viewed disclosure of the misstated or omitted fact as significantly altering the "total mix" of information available. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). As the Ninth Circuit has long stated, "[s]urely the materiality of information relating to [a company's] financial condition, solvency and profitability is not subject to serious challenge." *See SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980). Jasper's backdating scheme resulted in the omission of hundreds of millions of dollars in expenses and caused Maxim's annual reports to overstate annual net income, the company's bottom line. Numerous courts have underscored the significance of net income to investors. *See Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 830 (8th Cir. 2003) ("Most investors would consider it significant, no matter what the mix of information available, that a company was not earning as much as it was claiming to earn."); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 n.9 (3d Cir. 1997) (Alito, J.) ("[E]arnings reports are among the pieces of data that investors find most relevant to their investment decisions. . . . Information concerning the firm's current and past earnings is likely to be relevant in predicting what future earnings might be. Thus, information about a company's past and current earnings is likely to be highly 'material.'" (citations omitted)); *SEC v Koenig*, 2007 WL 1074901, at *4 (N.D. Ill. Apr. 5,

2007) ("A GAAP violation is presumptively a false or misleading statement of material fact under Rule 10b-5.").

The stock price reaction to news revealing Maxim's backdating practice further demonstrates materiality. *See United States v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991) (stock price drop is a factor relevant to materiality); *SEC v. Bausch & Lomb Inc.*, 565 F.2d 8, 15-16 (2d Cir. 1977); *United States v. Ferguson*, 553 F. Supp. 2d 145, 152-53, 156-57 (D. Conn. 2008).[15] Here, Maxim's stock price declined in statistically significant amounts in response to initial revelations of backdating, the delay in the 10-K due to Maxim's options backdating investigation, and the first disclosure of the size of the restatement.

Jasper's willingness to misstate Maxim's financial statements in violation of GAAP and SEC requirements also reflected negatively on management's integrity and thus rendered the misstatements material. *See Zell v. InterCapital Income Sec., Inc.*, 675 F.2d 1041, 1045 (9th Cir. 1982) ("[V]iolations of securities statutes and regulations may have a direct bearing on managerial integrity."); *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 771 (11th Cir. 2007) ("[A] reasonable investor . . . is naturally interested in whether management is following the law in marketing the securities."); *Gebhardt*, 335 F.3d at 830 ("Management's integrity would probably be important to investors.").[16]

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[15] *See also No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 948-949 (9th Cir. 2003) (Tallman, J., dissenting) ("Stock price changes . . . are also relevant to the determination of materiality. . . . The *Basic* materiality test asks what a reasonable investor would consider significant; the market demonstrates the reactions of reasonable investors. At a minimum, the static or dynamic nature of a stock price after the disclosure of previously withheld information is strong evidence of how reasonable investors view the significance of the information.").

[16] *See In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 139 (S.D.N.Y. 2008) (finding materiality in stock option backdating case and reasoning the CEO's personal certification of "the false statements . . . can be seen as 'impugn[ing] the integrity of management,' which in itself [is] material to investors") (quoting *In re Comverse Tech., Inc. Sec. Litig.*, 543 F. Supp. 2d 134, 151-52 (E.D.N.Y. 2008)) (alteration in original); *Takara Trust v. Molex Inc.*, 429 F. Supp. 2d 960, 978 (N.D. Ill. 2006) ("If a company's leaders knowingly misrepresented their earnings, investors may reasonably question the integrity of the company's management, and thus cause an alleged misstatement or omission to be material."); *Siemers v. Wells Fargo & Co.*, 2007 WL 1140660, at *8 (N.D. Cal. Apr. 17. 2007) ("The integrity of management is always of importance to investors. That a fiduciary has been misappropriating the common fund – even in small amounts – would be

Footnote continued on next page

One of Maxim's largest shareholders had express written policies disapproving of in-the-money options and indicating it generally voted against proposals allowing in-the-money options. A leading corporate governance firm took a similar position. *See infra* n.11. Before invoking the Fifth Amendment, Jasper himself acknowledged that expensing at-the-money options could have a material adverse impact on Maxim's ability to attract, retain, and motivate employees and on its financial condition. Ex. 91 at 8 & 13-14. He suggested changing accounting firms when Ernst & Young publicly advocated changes in the accounting rules requiring expensing of at-the-money options. Ex. 71. Moreover, his efforts to backdate documents to avoid the expense speaks volumes that he and Maxim believed the expense to be significant to investors. *See United States v. Reyes*, 2007 WL 2288120, at *4 (N.D. Cal. Aug. 7, 2007) (noting materiality could be inferred from management's belief and actions); *Ferguson*, 553 F. Supp. 2d at 153; *SEC v. Adler*, 137 F.3d 1325, 1340-41 (11th Cir. 1998); *SEC v. Shapiro*, 494 F.2d 1301, 1307 (2d Cir. 1974).

Finally, Jasper's misstatements and omissions, contained in periodic filings with the Commission, registration statements, and press releases, were made in connection with the purchase and sale, and in the offer and sale, of securities. *See McGann v. Ernst & Young*, 102 F.3d 390, 397 (9th Cir. 1996) ("Fraudulent Forms 10-K . . . fall within the ambit of § 10(b)."); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993) (§ 10(b) liability extends to a document like a press release on which an investor would presumably rely); *SEC v. Wolfson*, 539 F.3d 1249, 1263-64 (10th Cir. 2008).

2. Jasper Aided and Abetted Maxim's Violations of the Periodic Reporting Provisions

Section 13(a) of the Exchange Act and Rules 13a-1, 13a-11, and 13a-13 thereunder require public companies to file with the Commission accurate annual, quarterly, and current reports. 15 U.S.C. § 78m(a) & 17 C.F.R. §§ 240.13a-1, 240.13a-11, & 240.13a-13; *see SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 72 (D.C. Cir. 1980). Rule 12b-20 similarly requires that these reports contain any material information necessary to make the requisite statements made in the reports not

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important to investors, for the next misappropriation or defalcation could be larger. Intentional misappropriation would always be a red flag, a negative risk factor of material interest to investors.").

misleading. 17 C.F.R. § 240.12b-20. Section 13(a) does not require proof of scienter. *See SEC v. McNulty*, 137 F.3d 732, 740-741 (2d Cir. 1998).

Aiding and abetting liability is established by (1) an independent primary violation; (2) knowledge by the aider and abettor of the primary violation and of his role in furthering it; and (3) "substantial assistance." *See SEC v. Fehn*, 97 F.3d 1276, 1288 (9th Cir. 1996).

Maxim violated these provisions by filing with the Commission false and misleading annual, quarterly, and current reports. These reports falsely stated that Maxim recorded stock option expenses in accordance with APB 25 and granted only at-the-money options. They also significantly overstated Maxim's net income. Maxim ultimately restated its false and misleading filings. As demonstrated above, *see infra* IV.B.1, Jasper knew the reports were false and misleading. He provided substantial assistance to Maxim's violations by reviewing, signing, and certifying the false and misleading filings. *Cf. Fehn*, 97 F.3d at 1293-94.

3. Jasper Falsified Maxim's Books and Records and Aided and Abetted Maxim's Books-and-Records Violations

Exchange Act Section 13(b)(2)(A) requires public companies to "make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions . . . of the issuer." Scienter is not required for a Section 13(b)(2)(A) violation. *McNulty*, 137 F.3d at 740-741; *Ponce*, 345 F.3d at 737; *SEC v. World-Wide Coin Inv., Ltd.*, 567 F. Supp. 724, 749 & 751 (N.D. Ga. 1983).

Section 13(b)(5) of the Exchange Act prohibits persons from knowingly falsifying books and records subject to Section 13(b)(2)(A). 15 U.S.C. § 78m(b)(5). In addition, Rule 13b2-1 contains a separate prohibition on falsifying books and records. It provides: "No person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Exchange Act." 17 C.F.R. § 240.13b2-1. Scienter is not required for a Rule 13b2-1 violation. *Ponce*, 345 F.3d at 737 n.10 ("a plain reading of Section 13(b) reveals that it also does not impose a scienter requirement"); Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act Release No. 15570, 44 Fed. Reg. 10964, 10968 (Feb. 15, 1979) ("Adopting Release") ("[T]he Commission

has determined that a '*scienter*' requirement should not be included in the Rule."); *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865-66 (S.D.N.Y. 1997) (Sotomayor, J.).

Jasper violated Section 13(b)(5) and Rule 13b2-1, and aided and abetted Maxim's violations of Section 13(b)(2)(A). As described above, Jasper signed, reviewed, and certified numerous false SEC filings that omitted hundreds of millions in expenses. He prepared backdated paperwork for Maxim's CEO, *see e.g.*, Exs. 31, 34, 36, 52, & 59, and he assisted the CEO in selecting with hindsight grant dates corresponding to low points in the stock price, knowing that the grants would be recorded in the books as at-the-money grants and that no expense was recorded, *see infra* p. III.C.

4. Jasper Aided and Abetted Maxim's Internal Control Violations

Section 13(b)(2)(B) requires public companies to devise and maintain an adequate system of internal accounting controls. Maxim has admitted it violated these provisions. *See* Ex. H at 69-75 (disclosing material weaknesses in its internal controls). Jasper aided and abetted Maxim's violations.[17] Jasper admitted he was responsible for Maxim's internal controls. *See infra* n.4. Maxim's deficient internal controls resulted in hundreds of millions of omitted expenses and the firm's delisting from NASDAQ. Jasper knew that Maxim was backdating and not recording the requisite expense. *See infra* III.C-E. For these reasons, liability on the Commission's internal controls claims is established.

5. Jasper Lied to Maxim's Auditor

Exchange Act Rule 13b2-2 prohibits public company officers from making false or misleading statements to accountants in connection with audits, reviews, or examinations of financial statements or the preparation or filing of SEC documents or reports. 17 C.F.R. § 240.13b2-2. Scienter is not an element of a Rule 13b2-2 claim. *See Ponce*, 345 F.3d at 737 n.10; *Softpoint*, 958 F. Supp. at 865-66; Adopting Release at 10969-70.

The facts show Jasper made false and misleading statements to Maxim's outside auditor. In representation letters to Ernst & Young, Jasper stated that Maxim's financial statements were fairly

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[17] Jasper is also directly liable under Section 13(b)(5), which prohibits persons from knowingly circumventing or failing to implement an adequate system of internal controls. 15 U.S.C. §78m(b)(5).

stated in conformity with GAAP. *See* Exs. 151-152. They were not. Jasper thus violated the Rule.

6. Jasper Falsely Certified Maxim's Periodic Reports with the Commission

Exchange Act Rule 13a-14 requires annual and quarterly reports filed with the Commission to include certifications by the CEO and CFO that, among other things, the reports include no material misstatements and omit no material information. 17 C.F.R. § 240.13a-14. Jasper violated these provisions by falsely certifying that Maxim's annual and quarterly reports fairly stated Maxim's financial condition.

7. Jasper Committed Proxy Fraud Violations

Exchange Act Rule 14a-9, promulgated under Section 14(a) of the Exchange Act, prohibits materially false or misleading statements or omissions in proxy statements. 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-9. "There is no required state of mind for a violation of section 14(a); a proxy solicitation that contains a misleading misrepresentation or omission violates the section even if the issuer believed in perfect good faith that there was nothing misleading in the proxy materials." *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009). The materiality standard is the same as that for Section 10(b) claims. *See Basic*, 485 U.S. at 231-32.

Jasper is liable on the Commission's proxy claim. Maxim's 2004 and 2005 proxy statements, which Jasper reviewed, falsely assured investors asked to approve Maxim's stock option plans that Maxim only granted at-the-money options. In fact, Maxim's routine practice was to grant backdated in-the-money options. These misstatements were material. *See infra* IV.B.1.

C. Summary Judgment Is Particularly Appropriate Because the Court Should Draw Adverse Inferences from Jasper's Refusal to Testify and Preclude Him from Testifying at Trial

There are additional reasons why summary judgment is warranted. In response to the overwhelming evidence of liability, Jasper has chosen not to respond. This choice has consequences in this civil litigation.

When a party in a civil proceeding invokes the Fifth Amendment and refuses to testify, a district court is "free to draw adverse inferences from [his] failure of proof." *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) (affirming summary judgment against a silent party); *see, e.g.*, *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse

inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . . ."). The inference may be drawn if there is a substantial need for the information, there is not another less burdensome way of obtaining it, and there is independent evidence of the fact about which the party refuses to testify. *See Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 911-12 (9th Cir. 2008) (affirming district court decision to draw inference where defendant refused to answer questions going "to the central question in [the] case").

In this case, Jasper failed to provide any substantive response to discovery. He asserted the Fifth Amendment and provided no substantive response to the SEC's questions at deposition and written discovery. *Infra* III.H. & Exs. R-Y. The Court should therefore draw an adverse inference from Jasper's refusal to testify. Jasper's first-hand recollection of Maxim's backdating practice, the need to expense in-the-money options, Maxim's public filings, Maxim's communications with investors, and Maxim's view of expensing options go directly to the central questions in this case, and thus there is a substantial need for the information. *Cf. Nationwide*, 541 F.3d at 911-13. There is substantial independent evidence of Jasper's fraudulent conduct, particularly his scienter. Documents and testimony demonstrate Jasper knew an expense was required for in-the-money options, yet repeatedly suggested to Maxim's CEO that the company backdate options. Documents and testimony also show Jasper knew Maxim's CEO was selecting certain grant dates with hindsight. Jasper also swore he read Maxim's annual and quarterly reports, which omitted the required expense and falsely assured investors Maxim had granted no in-the-money options. The adverse inference is yet another reason why, on this record, no rational trier of fact could find in favor of Jasper.

Jasper also should not be permitted to present evidence in opposition to summary judgment or testify at trial. "Trial courts generally will not permit a party to invoke the privilege against self-incrimination with respect to deposition questions and then later testify about the same subject matter at trial." *Nationwide*, 541 F.3d at 910. In a civil case, a defendant "cannot have it both ways. By hiding behind the protection of the Fifth Amendment as to his contentions, he gives up the right to prove them . . . forfeit[ing] the right to offer evidence disputing the plaintiff's evidence or supporting his own denials." *SEC v. Benson*, 657 F. Supp. 1122, 1129 (S.D.N.Y. 1987), *cited in SEC v. Colello*,

139 F.3d 674 (9th Cir. 1998).[18] By completely stonewalling in response to discovery and providing no information that the SEC sought to help develop the case, Jasper has given up the right to testify. The SEC's evidence thus stands unrebutted, and with Jasper unable to present new evidence at trial, judgment is appropriate now.

V. CONCLUSION

The Court should grant summary judgment and find Jasper liable for the securities law violations alleged against him. If summary judgment is not rendered on the whole action, the Court should, to the extent practicable, determine what material facts are not genuinely at issue.

Dated: October 5, 2009

Respectfully Submitted,

/s/ Robert S. Leach
Robert S. Leach

Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION

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[18] In awarding summary judgment to the SEC, numerous courts have prohibited defendants who invoked the Fifth Amendment from presenting evidence in opposition. *See, e.g.*, *SEC v. Merrill Scott & Assocs., Ltd.*, 505 F. Supp. 2d 1193, 1209-12 (D. Utah 2007) (striking sworn discovery responses for purposes of summary judgment based on defendant's prior assertion of privilege); *SEC v. Global Telecom Servs. L.L.C.*, 325 F. Supp. 2d 94, 109-11 (D. Conn. 2004) (declining to consider SEC investigative testimony where defendant asserted Fifth Amendment during deposition); *Softpoint,* 958 F. Supp. at 855-59 (precluding defendant from offering testimony in opposition to summary judgment), *aff'd*, 159 F.3d 1348 (2d Cir. 1998); *SEC v. Grossman*, 887 F. Supp. 649, 660 (S.D.N.Y. 1995) (having exercised the Fifth Amendment privilege defendants "cannot now complain that they are precluded from offering evidence on the very issues for which they have declined to provide discovery for several years"); *SEC v. Interlink Data Network of Los Angeles, Inc.*, 1993 WL 603274, at *7-8 & n.97 (C.D. Cal. Nov. 15, 1993); *see also United States v. 4003-4005 5th Ave., Brooklyn, NY*, 55 F.3d 78, 80 (2d Cir. 1995) ("[T]he District Court did not exceed its discretion when it barred [claimant] from testifying as to matters covered by his prior Fifth Amendment claim."); *SEC v. Zimmerman*, 854 F. Supp. 896, 899 (N.D. Ga. 1993) (precluding defendant from offering evidence at trial that he had withheld on Fifth Amendment grounds); *SEC v. Cymaticolor Corp.*, 106 F.R.D. 545, 550 (S.D.N.Y. 1985).